United States Court of Appeals for the Second Circuit



APPENDIX

77-1053

To Be Argued By: JOSEPH BEELER

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 77-1053

UNITED STATES OF AMERICA.

Plaintiff-Appellee,

v.

ERNEST TUCKER and GAIL ANN TUCKER.

Defendants-Appellants.

On Appeal from the United States District Court
For the Southern District of New York

APPENDIX FOR APPELLANT

Of Counsel:

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Excerpts from Transcript of the Trial

Charge of the Court

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If you can tell me how long the trial will take, gentlemen, I will put it down for the earliest date that I can schedule it.

How long do you expect to take Mr. Cutner?

MR.CUTNER: Your Honor, I expect the case could
be tried within a week, within the trial days, perhaps
less even.

THE COURT: I don't think it should take long.

You know, I conducted a hearing in this case, and probably
heard and saw some of the same witnesses. In fact, I'm

curious about the defendants going to trial.

I note two things: I note the record which was compiled at the prior hearing when Mr. Chance was not present, and I do have some awareness of the defendant's prior involvement with the law which, unfortunately for him, take up the better part of three pages of an FBI sheet, and I must suggest that if he wishes to go to trial that is his right, but I did hear some of the evidence in this case already from the victims.

MR. CHANCE: Judge, at this point the defendant is not present, but the defendant has indicated to me that he would hope that I would make a motion, ask you -- and I hadn't seen you but I had decided to discuss this with your prior to my arrival here today -- is that this matter

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might be assigned to some other judge because of the fact that you had heard the previous trial and the previous evidence in this case.

THE COURT: The prior proceedings were civil in nature.

MR. CHANCE: I understand.

THE COURT: And this will be a criminal case.

The prior proceedings were with a jury. This will be with a jury. He will get a fair trial; and if, as and when he comes before me for sentence he will get a fair sentence.

MR. CHANCE: May I now just indicate that -THE COURT: You don't indicate. You make
motions on papers supported by your client's affidavit. If

there is some factual presentation which you wish to make short of the fact that I merely presided previously, then I expect that your client will say so in affidavit form.

At this point I think we should proceed -- incidentally, you have known about this for months. You don't
sit around and wait. The time for making such motions, I
would suggest, has long since passed.

I see that the arraignment was on July 22nd.

I would note for the record this is November 1st. The mere delay from the time this case was assigned to me would militate against anything positive resulting from an

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for?

application made orally, and I am not sure, relative to the efficacy of an application made so late in point of time of the papers. If he's got something -- I haven't see him, I haven't laid eyes on him, you know, nor his wife; neither of them, if my memory serves, chose to testify before me, so I have no preconceived notions of anything other than what I have already written in a civil fraud decision. I can only reiterate that he comes here with the presumption of innocence, and it will be necessary for the government to prove his guilt beyond a reasonable doubt.

I suggest that we put this case down for trial next Tuesday. We should be finished with the criminal case that will end this week; it will probably go to the jury on Monday and we will be ready for you bright and early Tuesday.

MR. CHANCE: Judge, could I impose upon your discretion to make it the following Tuesday, at least one week later than the Tuesday that you set down?

THE COURT: No, I couldn't do that.

Miss Kruger, we have that TMT case set for Mon-day, the 15th?

THE CLERK: Absolutely.

THE COURT: How long is the TMT case scheduled

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THE CLERK: That I honestly don't know. It may take a week.

THE COURT: Well, we could follow the TMT case with this one. My recollection is that the TMT case is a two-week trial.

MR. CHANCE: That would be what date, Judge?

THE COURT: We will set this case down for trial
on Monday, November 29 at 10:00 o'clock on courtroom 706.

I think we should consider very carefully this matter of the two defendants being represented by the same autorney, and I am going to rule now that they should not be even if their desire is otherwise.

MR. CHANCE: Now, I could possibly -- I could indicate this to you, Judge -- and I agree with you -- is that because when people reach difficulty, tooth and tongue quite often fall out and marriage is not overly significant where that is concerned.

However, I have some idea about the financial status in order that we won't run into a problem. I don't know precisely how it would be done, but I would request if at this time you could appoint a counsel to represent Mrs. Tucker --

THE COURT: I would suggest you get Mrs. Tucker in here; have her fill out a C. form, and if that sworn

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represented together by Mr. Chance.

Now, I don't know if the client's views should be deemed to override what both of you gentlemen say.

Frankly, I am disposed to go along with your thoughts rather than your client's thoughts that both defendants be represented or each defendant be represented by separate counsel.

Mr. Chance, I know that you having been in the case for awhile and representing Mr. Tucker would be ready to proceed on the day in question. Now, is there a problem if Mrs. Tucker were to retain separate counsel and if so, would you advise the Court of that at this time?

MR. CHANCE: I am of the opinion, Judge, and having discussed it with Mr. Tucker, that if she has separate counsel that that counsel would need some time to prepare Mrs. Tucker's case. I feel as though that under the circumstances the date of November 29th having been fixed as a firm date, I would even request an extension of that date because of the complexity of the case and because of the new attorney and the new defense counsel, what I would determine as a dual defense that we would need more time in any instance to proceed further than the 29th. If you can find within your discretion to

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extend the adjournment past the 29th because of the problems that have arisen, I would appreciate it.

MR. CUTNER: Your Honor, I would object to any adjournment. This case was set down, I believe, on November 1st for trial on the 29th of the month. Your Honor also ordered that the defendants personally appear before your Honor on the 9th of November. That was if there was any problem at all concerning their representation. They did not do that. They are now faced with further problems concerning their representation.

as I am concerned, it is not an unduly complicated case. I expect that the Government's proof would not take more than two and a half to three days. I don't believe that it is a complicated case at all. I would ask your Honor to order that both defendants proceed to trial on the 29th as indeed your Honor has already ordered. I think there is adequate time for new counsel to come into the case and be fully prepared to go forward on the 29th of November.

MR. CHANCE: If I might just answer for a moment. His Honor has heard a part of this case in another proceeding.

THE COURT: In a civil proceeding.

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MR. CHANCE: And as to the complexity of the case I think his Honor is pretty well aware. From my reading of that, it does require some preparation and some time and I do not know whether new counsel would have time to prepare and I also would believe that on behalf of Mr. Tucker, that there is some extended time needed because of the getting of the witnesses and interviewing of those witnesses just prior to trial would take some time past the 29th.

THE COURT: Well, I have to tell you that this indictment was filed on July 13th and therefore it is almost four months that it has been pending. You have been involved in the case, Mr. Chance, since the outset and I am sure that in my mind you have had an opportunity in preparing the case to gather a certain amount of testimonial evidence and documentary proof. And absent some specific showing, I think that the results of your labors will and should be shared with counsel who will be working with you. In fact, the clients themselves indicate their interests are consistent. I would imagine again that you have gone done the spade work here, the job of counsel would be much easier than someone coming in on a one-defendant case for the first time.

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Under the circumstances, I will adhere to the trial date which I set on November 1st which was for trial on November 29th at ten a.m. here in Courtroom 706. I will expect you to be ready on behalf of Mr. Tucker by that day and time. If Mr. Tucker is ready, we will proceed with the case if both defendants are ready. If Mrs. Tucker is not ready to proceed, I will consider what to do at that stage. But, in order to obviate any problems, I am going to direct that an appearance be filed on behalf of the second defendant no later than Friday, November 12th at five p.m. In the event that that is not done, I am going to direct that Mr. and Mrs. Tucker both appear personally before me on Monday, November 15th at four p.m. What I will do is adjourn this pretrial conference until Monday, November 15th at four p.m. here in Courtroom 706. That would leave new counsel with something over two weeks to prepare because he would be coming in on the 12th and if there is no new counsel on Monday the 15th, I'll deal with the matter at that time.

It is my firm intention to proceed to trial with Mr. Tucker and hopefully with Mrs. tucker also on Monday, November 29th. So that when new counsel is interviewed by the client and perhaps you can confer

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it would seem to me that each of you gentlemen in order to conduct a spirited and coordinated defense best calculated to protect your client's interest, should speak with your clients individually regarding the prospective witnesses and then check with each other so that you don't fall all over each other's feet in subpoenaing them.

Obviously, you want to cover the people who are necessary.

I believe that it is likely that you will find an overlap of witnesses. You may have one or two who are peculiar to one defendant or the other. I suggest that Mr. Chance will, I'm sure, cooperate with you and work with you. I suggest that now that you have been retained get from your client the list of the witnesses, check them out with Mr. Chance if he has already underway speaking with them, fine. But you get to talk to them. Then you get your own subpoenaes out. I have a feeling your subpoenaes will probably, as I say, overlap and separately and apart be fewer in number than Mr. Chance's.

MR. RICHARDSON: Sir, I recognize that, but in terms of a separate defense for Mrs. Tucker, I would be less than candid if I didn't say that I may need additional time to prepare for this case.

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THE COURT: There will be none.

MR. RICHARDSON: At this time, sir, I cannot say I will require it or not.

THE COURT: What's that? I want you to know this. You have two weeks from the beginning of the trial to prepare yourself to go ahead.

This trial was set down the 1st of this month for the date which we are talking about now, the 29th of the month. So there's been four weeks notice to the client. Of course, you have come into the case approximately two weeks before the trial.

MR. RICHARDSON: I understand that, sir.

THE COURT: I suggest under the circumstances

I expect you to be ready on Monday, NOvember 29th.

Now, as you progress in your preparation of the defense of the case if you come to a specific problem, I suggest that you bring the matter to my attention and I'll listen to you and we'll deal with the problem and I'll try to assist, as I said before, in its resolution. So, the way we are going to leave it is this, and I want you to understand this: This case was set the lst of the month for trial on the 29th of the month. It is this Court's intention to try the case on the 29th. Aside from the case that went on trial today,

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MR. CUTNER: No. The notice was filed November 12th and the conference was November 15th. 3

> MR. RICHARDSON: At that time I had been aware of the Tucker matter having appeared with Mr. Chance on Movember the 9th, Mr. Chance had informed me that there might be a possibility of Mrs. Tucker needing separate counsel, but that she had not at that time agreed that he should seek out counsel for her, but it might be useful to me in the event that I would be retained by her. At that time my knowledge of the case was quite limited.

Since my retainer I have applied myself to this case I would consider very diligently. I have spent at least four hours a day and more perusing the papers, doing research and getting the gist of the case so that I might assist my client in preparing the defense for it.

Mr. Cutner has been quite generous, I wish to say, on discovery. I spent upwards of four hours in his office reviewing the papers, trying to make a designation as to which papers that he has in his possession which might be relevant or useful to me in the defense of my client.

He has furnished me with copies of papers which I considered at the time would be useful.

I must say, however, that his files are

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voluminous. There were at least 23 or 25 separate stacks of papers under various headings. At the time I did conduct my discovery it is conceivable that many papers that might have been of use and critical to the defense of my client might have been overlooked because of the time. At the same time, I was reviewing the various papers in the possession fo Mr. Chance that were furnished to him by Mr. Tucker and Mrs. Tucker.

It appears to me, sir, that I am just about getting to the position where I can make a determination as to which papers are of use to me in the defense, which are critical.

It further occurs to me that the very nature of the relationship of the defendant's position certain there are certain questions which I have not had an opportunity to research fully. It is conceivable to me that certain evidence that might be available to my cliert, that I may have a problem with it because of certain communications between husgand and wife. I am not saying it as a fact, but it occurs to me I may have such a problem.

It has come to my attention further that an attorney that was in the employ or had been engaged in some fashion by Unique has given certain testimony to the

Grand Jury, which testimony may or may not have been privileged. I haven't had an opportunity to search out these things as yet.

It may arise that perhaps the door might have been opened by one of the defendants, but I don't know whether that door has been opened to my defendant. These are the kinds of things, sir, and other that I feel that based on the premise that Mrs. Tucker must have competent counsel, and it seems to me that the competency of counsel means preparation, the right to be prepared, and the right to feel that you are prepared. That's the gist of my application at this time, for and a judgment of the case with respect to Gail Ann Tucker to allow counsel sufficient time to be adequately prepared for the defense of Mrs. Tucker.

MR. CUTNER: Your Honor, I have a position on this if I might.

THE COURT: I thought first we would hear if Mr. Chance, who represents Ernest Tucker, has anything he wishes to say. Mr. Chance, of course, has been in the case for a considerably longer period of time than Mr. Richardson and under the circumstances I would hear Mr. Chance and then I will hear from Mr. Cutner.

MR. CHANCE: Judge, the real problem that I

run into is with the indictment. As I understand it, our defense must be within the four corners of the indictment. Paragraph 3 and Paragraph 4. These are some materials that are in the hands of the carrier and I have not so far gotten them from the carrier. The carrier has had several strikes and I have had someone to look into it, to find out whether we could get that information and I do not believe that we are going to have it by the 29th. It is vital in this particular case that we have that information from the carrier, because there is an allegation there that there was some customers who did not receive what they had ordered and had paid substantial sums. Now, there was the Post Office and there were other private carriers.

Now, I have the information that relates to the Post Office, but I do not have the form that relates to the carriers. I think that's not only critical, but vital, which makes it in sum total, that I am not presently totally prepared to move forward for Mr. Tucker, and he is in a critical position, he faces a possible imprisonment and he faces possible — more than one kind of punishment in this case and I have not delayed too much and I have dallied some, I will admit to that because of my schedule and other things which are personal, but I have

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not been able to get that information which constitutes two paragraphs in the indictment. I for that reason would pray for your consideration and your discretion in granting us an adjournment, if there is any way possible within the purview of your dealing with the case as it comes before you.

THE COURT: Mr. Cutner.

MR. CUTNER: Yes, your Honor. I oppose any adjournment of the trial.

MR. CHANCE: Excuse me one moment, if I may interrupt.

THE COURT: Yes, Mr. Chance.

MR. CHANCE: Besides the carrier, I do not have the returns from the Post Office. I have some indication, but he did not have the returns from the Post Office.

MR. CUTNER: Your Honor, I oppose any adjournment of the trial, and I would like to put some further facts before your Honor. The first is that the indictment was filed on July 13, 1976 and Mr. Chance filed a notice of appearance on July 22, 1976. Your Honor called a pretrial conference on November 1st, at which time your Honor set the trial down for November 29, 1976. At that time Mr. Chance appeared on behalf of Mr. Tucker

DEFENDANT E. TUCKER: I am saying this in strategy and in effect of effective assistance of counsel I am saying this in regard to motives — in other words, motives and activities that we should be participating in now and these are things that some we agree on and some we disagree on, so I would like the record to show that there is a possibility that at the moment I have grave, grave doubts in regards to whether I would — whether I feel that I can willingly consent to Mr. Chance's defending me on this. Now, I realize I have very little choice in a way of speaking and I don't want to be found in contempt of the Court.

THE COURT: You won't be. You have this choice. Mr. Chance was selected by you, was retained by you and is known by the Court to be a competent and respected lawyer in this District. You have the right, if you wish, and I don't urge you to do it, to represent yourself at this trial and have Mr. Chance sit beside you to advise you and to assist you and you can proceed in that fashion. I do not urge that on you. If you had an adviser or you had an attorney who I did not consider to be an accomplished one, you might consider it, but I would suggest that you begin by taking his counsel, and if you feel that you wish to participate actively

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at some point in the trial, I will hear you ougside of the presence of the jury and we will see where we go from there, but you also have the right, as I understand the Supreme Court's decision, to represent yourself.

DEFENDANT E. TUCKER: Your Monor, may I lso this this: Do I also have the right to -- with the Court's permission, that even though I have the utmost confidence in Mr. Chance's ability and qualifications as an attorney, I selected Mr. Chance and he did not call me in any manner, but what I am saying is Mr. Chance and I, we both agree that on the fourth and fifth, if I am not mistaken, Paragraphs 4 and 5, that there is information that we would probably need time to gather that information, but I am saying that there are other areas while we have different variations of an agreement on.

this to you, sir. You have the right to counsel. You have chosen and have had him for four months, Mr. Chance. If you want to change lawyers you are free to do so just as long as your new lawyer is ready to be here ready to go on the 29th, but your more practical alternative is to be prepared to work with Mr. Chance. If you wish to take a lead position and have Mr. Chance as your adviser you may do so. I think those are your choices:

I see it.

You go with Mr. Chance, you get a new attorney who will be ready to go on the date set by this Court a long time ago or you take the lead and I ask you, Mr. Chance, to sit there and advise me. Those are your choices as

DEFENDANT E. TUCKER: Your Honor, may I add one thing, please?

THE COURT: Yes.

DEFENDANT E. TUCKER: I have no intentions of a design to defend myself, but in case, if I can show the Court, or maybe Mr. Chance and I together, if we can show the Court that there are other extenuating circumstances that would sort of prohibit my receiving a fair trial, being that we are not ready on certain areas, and it is not because I would think it would be negligent on our part, on my part or on Mr. Chance's part, would it be considered of whether we can get a continuance of possibly two, three weeks on this?

THE COURT: That matter has already been presented to me in a different form. You have now represented it.

DEFENDANT E. TUCKER: But I wanted to be on record.

THE COURT: The application for a continuance

Excerpts from Trial Transcript

1	mbbr Gray-direct 134
2	this time.
3	THE COURT: I just want to clarify some-
4	thing. Is it your testimony, Mrm Grav, that one day you
5	received this booklet in the mail?
6	THE WITNESS: Yes, sir.
7	THE COURT: That was not in response to your
8	having sent anything in or having answered any ad?
9	THE WITNESS: Not to my knowledge, sir.
10	THE COURT: As far as you know the booklet
11	just arrived one day in the mail?
12	THE WITNESS: Yes, sir.
13	(Pause.)
14	THE COURT: You may proceed, Mr. Cutner.
15	Q Mr. Gray, did you read the brochure?
16	A Yes, sir.
17	Q What did you do, if anything, after reading it?
18	A I thought about it for a while. It seemed
19	to be a reasonable offer, and I filled out the application,
20	both sides, and issued a check for \$205 and sent the applica-
21	tion in.
22	THE COURT: How did you send it in?
23	THE WITNESS: By mail.
24	THE COURT: What about the check?
25	THE WITNESS: The check was from my business

1	mbbr	Hummer-direct 175
2	material.	
3		THE COURT: How?
4		THE WITNESS: In the mail.
5		THE COURT: How did you send the check which
6	is Government	's Exhibit 26?
7		THE WITNESS: How did I send it?
8		THE COURT: Yes.
9		THE WITNESS: Put it in an envelope and sent
10	it right alone	g with the order.
11		THE COURT: By what means?
12		THE WITNESS: Through the United States Mail.
13		THE COURT: Very well.
14	Ω	Did you send that regular mail or certified
15	mail?	
16	A	I believe we sent that regular mail.
17		MR.RICHARDSON: I object, your Honor. Would
18	he please ide	ntify which exhibit he is speaking about?
19		THE COURT: Yes, I think that is appropriate.
20	Why don't you	go back and ask the question again?
21		MR. CUTNER: I will withdraw the question and
22	go on, your H	onor.
23	Q	What if anything happened after you sent in
24	your check fo	r \$325?
25	A	In a short period of time I received a notice

1	mbbr Gutz-direct 207
2	MR. CUTNER: Yes.
3	(Government's Exhibits 34 and 34-A were
4	received in evidence.)
5	THE COURT: Very well.
6	THE COURT: Just one question. I want to
7	clarify something. After you got the money order, what
8	did you do with it?
9	THE WITNESS: I sent it to Mr. Tucker in return
10	for 2,000 of the literature that we were supposed to mail
11	out to the various neople.
12	THE COURT: By what means did you send him the
13	money order?
14	THE WITNESS: By mail.
15	O Mr. Gutz, what happened after you sent your
16	money order for \$205?
17	A About the 15th day of December, I received
18	the mailing list.
19	Q The mailing labels?
20	A Yes.
21	O Did you receive the envelopes?
22	A No.
23	O Did there come a time when you received the
24	envelopes?
25	A About the middle of January before I got the

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1	mba3	Myers-direct
2	making plan	
3	Ď.	And you read the ad?
4	A	Yes, sir.
5	Ü	What did you do after you read the ad?
6	A	I filled out a coupon and sent it with
7	\$10 to Uniq	ue.
8	Q	What happened after that?
9		THE COURT: Is that a company called Unique
10	Ideas?	
11		THE WITNESS: Yes, sir.
12		THE COURT: Where is that company located?
13	Where did y	ou send it?
14		THE WITNESS: New York City.
15		THE COURT: How did you send the coupon
16	and the \$10	, by what means?
17		THE WITNESS: By mail.
18		THE COURT: You may proceed.
19	Ũ	Did you get something back, Mr. Myers?
20	A	Yes, I got some literature in regards to
21	the plan th	at I was supposed to make money with.
22		THE COURT: How did you receive that
23	literature,	by what means?
24		THE WITNESS: Through the mail.
25		MP. CUTNER: May I have this marked as

principal or an aider and abettor.

In addition, the proof is clear, since this was a mail order business, that the mails were used in furtherance of the scheme to defraud.

The Government having proved the essential elements of the crime sufficiently to withstand a motion for judgment of acquittal on these eighteen counts, the motions made on behalf of defendants Ernest Lee Tucker and Gail Ann Tucker are denied. The remaining counts are dismissed.

I will deal now with the application by counsel for the defendant Gail Ann Tucker for a continuance.

I rule that the application is premature since the first defendant to go forward will be the first-named defendant, Ernest Lee Tucker.

I would note that in the case of Mr. Tucker his attorney, Mr. Chance, was retained and did appear on July 22, 1976, over four months ago. When Mr. Tucker has completed his testimony, I will then deal with the application on behalf of Gail Ann Tucker.

We will resume at 1:45 p.m.

Court is adjourned.

(Luncheon recess)

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THE COURT: WE will strike out the statement, but I suggest that, the jurors being reasonable men and women who have taken their good judgment and common sense and brought it with them to the courthouse, I think they are just as well equipped to read this book as anybody; and if you want to explain something, Mr. Tucker, you go right ahead.

THE WITNESS: Okay.

THE COURT: You say you are supposed to -- I want to hear his explanation -- you say the fellow reading the book, he starts at the front and he continues to read. He gets to page 10. Is that right?

THE WITNESS: Yes, sir.

THE COURT: Now, he gets to page 10. You say to understand what it says on page 10, you have to flip back. All right. Where do you flip back to?

THE WITNESS: What I am saying, if I mention my money-making method on page 10 here, and I have described it on page 7, then when you read page 10, if you don't -if you haven't read previously what my method is, there can be some confusion.

THE COURT: Taking the first nine pages, where is it where you describe what you call on the very first page, "My proven easy money method"? Where do you describe it in pages 1 through 9? Just show the jury and the Court.

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page 7?

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THE WITNESS: On page 7 there is sort of an introductory page before you get to page 8 where we have the items, photographs of the items.

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THE COURT: Where do you want us to look on

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THE WITNESS: On page 7 would be, for example, the second paragraph of page 7: "For example, here is one of the most recently tested and proven tools (a full-page advertisement) which you may recall having seen in such nationally popular publications as Ladies Circle, Playgirl, and practically every one of the romance magazines. Right at this very moment various successful advertisements of mine are bringing in big dollars for me by the bag full. For this reason I am not the least bit surprised that many of my rich friends would jump at the opportunity to buy outright these fast easy money-making advertisements."

But here I have referred to various other successful advertisements, and I have also --

THE COURT: You are talking about advertisements here in magazines; is that right?

THE WITNESS: Yes, advertisements other than -and advertisements throughout the years, and advertisements other than and simultaneously while we had our -- while we still had published the Ernie Tucker booklet, and before

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we published the Ernie Tucker booklet.

THE COURT: Did the easy money method involve your mail handlers placing advertisements in nationally popular publications?

THE WITNESS: No, this is -- this is a facet of the mail order field, and my method is the method of having individuals, giving them an offer or a chance to come into the mail order field, an opportunity to become a mail order operator or mail order business man.

Q Now, Mr. Tucker, you have referred us to page
7, and you said you referred to the paragraph, "For example,
here is one of my most recently tested and proven tools."

A Yes.

Q "A full page advertisement."

A Yes.

Q You were referring there, I take it, to the mink and sable roses advertisement; is that correct?

A Yes, that's -- yes, you are right.

Q Now let's go back to page --

A Page 10, I think.

Q Let's go back to page 10. When you said the orders keep pouring in by the thousands, you were referring to "these unusual luxury items," were you not?

A Let's go back to page 7. I was referring

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THE COURT: I thought he was listening, and I thought he was trying to answer the question until the rapping came along.

MR. CHANCE: Then I apologize.

THE COURT: Then you sit down, if you would, sir.

You know that you object by voice, not by rapping on the table during the middle of an answer. Now, let's listen to the question and let the jury hear the answer, and then, Mr. Tucker, you can complete the answer if you haven't done so.

- Q Your statements on page 10 were not meant to refer to the mink and sable roses ad?
 - A Page 11, in reference to your question --
- Q My question concerns your statements on page 10 which I have read a few times already. My question is, those statements were not intended to refer to the mink and sable roses ad; is that it?

A The mink and sable roses ad would be included within among my various advertisements, yes.

Again if we go back to page 7, the same paragraph, "Right at this very moment various successful advertisements of mine." This would include any and all ads, advertisements that we had at that particular time.

THE COURT: Anywhere in the brochure, which is made

1	mb 30 E. L. Tucker - cross
2	up of 32 pages, 30 numbered and then two back pages, do you
3	mention any other products beyond the mink and sable roses,
4	sir?
5	THE WITNESS: In conjunction no, I don't, your
6	Honor, but in conjunction with the name of a method, with
7	the ad.
8	THE COURT: But I just wanted to ask that question.
9	In other words, you said here, you directed our attention
10	to various successful advertisements bring in big dollars
11	for you by the bags full, and I only wanted to know if
12	anywhere in the brochure you mention any other products that
13	you were advertising.
14	THE WITNESS: Anywhere other than page 7?
15	THE COURT: No, where you mention specific products
16	othern than the mink and sable roses.
17	THE WITNESS: I refer to them on page 7, "right at
18	this very moment various successful advertisements," plural.
19	THE COURT: But you don't indicate the products that
20	were being advertised; is that correct?
21	THE WITNESS: No, I did not.
22	Q Mr. Tucker, can you tell us where on page 7
23	or on page 11 or anywhere else you refer to advertisements
24	for unusual luxury items?

There is no reference. The reference is made

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E. Tucker - cross mbrp35 THE COURT: Yes, indeed. Excuse me, ladies and gentlemen. Would you 3 bear with us? 4 5 (In the robing room.) (Counsel present. Defendant E. Tucker present.) MR. CHANCE: I don't think it will take long. DEFENDANT E. TUCKER: Can I have my wife present please? THE COURT: Yes. 10 Would you ask Mrs. Tucker to come in. 11 (Defendant G. Tucker entered the robing room.) 12 THE COURT: Let the record reflect that we have 13 adjourned to the robing room, outside of the presence of 14 the jury, Mr. Tucker has had a brief opportunity, very 15 brief, to confer with Mr. Chance. 16 After they had their conference without any 17 interruption from the Court, the Court was asked to join 18 counsel and the defendants in the robingroom, as Mr. Tucker 19 wished to make a statement. 20 I will hear you, sir. 21 DEFENDANT E. TUCKER: My statement, your Honor, is that 22 I have -- I see that the time is closing in on us, and 23 I had elieved that counsel would eventually learn this par-

ticular case, as counsel had told you on two or three

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different occasions, and I think a couple of them were on the record, that Mr. Chance said that he needed some time, and he mentioned one particular thing.

But what Mr. Chance didn't tell you is that for four months, and I think you emphasized that -- for four months he should have known, for four months Mr. Chance did not work on this case.

Mr. Chance and I talked back and forth from California, and only when you gave him the 29th date did he start working on this case.

We talked about a previous case, we have had many conversations about the civil matter that you were handling, and in reference to if it should turn out unfavorable, whether Mr. Chance's office will handle it. And only there were no pre-investigation on this. There were no -- we had no strategy sessions whatsoever.

So I think here we have ineffective counsel. I think Mr. Chance is a very competent attorney. I just don't think in this case that he but the time in. He even told you also that he had dillied but he didn't dally, which I didn't understand.

He told you this on the record in your office. I didn't understand what he meant by he had dillied but he never dallied, but I do not -- whether he dillied or dallied

E. Tucker - cross

that we just didn't have -- he told me the 29th. And since I have been here, there are many papers that we can't find, papers that were shipped to his office by other lawyers.

All my lawyers had sent their papers to Mr. Koenig.

Mr. Koenig in turn forwarded to Mr. Chance. When I got

here, there were papers missing. We had to go to Mr. -- an
other attorney, Mr. Jack Albert.

Mr. Jack Albett had called me out in California. He says, "Your lawyer just sent me some papers, Ernie, and they're papers that he should have himself because they're related to your criminal matter."

I asked Mr. Chance. He says, "Yes, I inadvertently sent them over."

This is just one of the -- one of many occasions.

So on the whole I have utmost respect for Mr. Chance, but

I just think that this case just caught him at a busy

time and somehow or other, he just hasn't been able to

put it together.

And in my talking with him, I think the record shows where he has been totally miles away off base as far as commenting on this case. Sometimes he has been -- if the Court reporter picked it up, I have had to correct him. And I just think it's too much at stake.

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E. Tucker - cross

I have heard statements of your Honor, statements, that if counsel continued this, that we would -- what was going to happen. And I listened to this.

I also listened to witnesses. Our witnesses are coming up. I hear where the Court seems to handle mr. Cutner's position. The Court seems to denigrate our witnesses, the statements that they make.

THE COURT: I will let the record -DEFENDANT E. TUCKER: This is my impression.

THE COURT: I will let the record in this case, sir, speak for itself. I will let the record speak for itslef.

You have had months to prepare for trial, twenty-nine days from the date this case was set down for trial, four weeks, with a firm trial date.

You have had time as the government's case has developed to listen, and learn.

So, under the circumstances, according to my view, you have received a fair trial. Apparently in the time between Friday and this morning, you determined that you were going to be convicted by this jury.

DEFENDANT E. TUCKER: No, sir, I did not.

THE COURT: Which I suggest has prompted from you, first, you were late this morning, approximately an

hour and something.

DEFENDANT E. TUCKER: I apologized to your Honor for that.

THE COURT: And secondly, you came bursting into this room to put into the record all kinds of things that apparently had been percolating in your mind, calculated to give the impression right up to the last moment that you have been deprived of the opportunity to prepare for trial, of the opportunity to be represented by competent counsel, and I suggest that you --

DEFENDANT E. TUCKER: I am on the record and I told you that last week, your Honor, a week ago when I first came to town, and we had a conference in your office, I told you that I was having problems with counsel, and I would try to work it out, and you told me that when the Court — even when trial began, if I still had my problems, that I could consult with you, and that's what I am doing. So I don't think it's fair, your Honor, to say that I am just making this up.

I did go on the record as telling you this at the first meeting that I had in your office with Mr. Chance, and Mr. Richardson here.

THE COURT: Sir, I believe that as the date for trial has drawn closer, you in your desire to put off

E. Tucker - cross

the day of judgment have resorted to a series of strategems which have culminated in your conduct this morning, both in the robing room, prior to our bringing the jury in, and to your most recent performance in the presence of the jury.

I told you that you had the right to be represented by counsel, you could be represented by Mr. Chance, who you had selected and retained in July, or any other counsel who was prepared to go to trial on the date set.

I also advised you that you had the right to .. represent yourself.

DEFENDANT E. TUCKER: I don't think I am qualified to represent myself, your Honor.

THE COURT: You chose to proceed with Mr. Chance, and I suggest that Mr. Chance has done everything reasonably possible to defend you in a case which is in my judgment a relatively simple case.

It may have required a number of witnesses, but it's relatively simple.

DEFENDANT E. TUCKER: But, your Honor, you are not familiar with my records and you are not familiar with the defense to say that even though I understand --

THE COURT: Mr. Tucker, it boils down to these brochures. Were they false, fraudulent and misleading,

You have chosen to throw in all kinds of

The gravamen of this case, sir, is were those

DEFENDANT E. TUCKER: I am asking for effective counsel, that is all I am asking for.

THE COURT: Those brochures which you prepared, were the brochures which you prepared false? DEFENDANT E. TUCKER: Absolutely not.

THE COURT: Misleading?

DEFENDANT E. TUCKER: Absolutely not.

THE COURT: That's a question not for you, not for me, but for that jury.

DEFENDANT E. TUCKER: But, your Honor, I am tell+ ing you that the attorneys have not sent out subpoenas that I asked. We have not had -- we have not had investigation of this case, pre-trial investigation. They have not sent out subpoenas. They have ignored my requests for subpoenas.

I even asked -- I have been asking would you sent out for United Parcel Service, would you send out for the post office.

As a client, as a defendant, don't I have the

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	1	mbrp50 E. Tucker - cross
	2	THE WITNESS: I will.
	3	THE COURT: to which you say you take excep-
	4	tion.
	5	(Pause.)
c	6	(Court Exhibit 2 marked for identification.)
•	7	THE WITNESS: The statement refers to the jury,
	8	your Honor. It has the word "jury" in it.
	9	(Pause.)
	10	MR. CUTNER: Your Honor, there is one pertinent
	11	thing here, perhaps I could state for the record.
	12	THE COURT: Please.
	13	MR. CUTNER: At page 22, your Honor made the
	14	following statement.
	15	"We will strike out the statement, but I
	16	suggest that the jurors, being reasonable men and women
	17	who have taken their good judgment and commen sense and
	18	brought it with them to the courthouse, I think they are
	19	just as well equipped to read this book as anybody, and
	20	if you want to explain something, Mr. Tucker, you go
	21	right ahead."
	22	Now, your Honor, I would say that this is
	23	being more than fair to Mr. Tucker. In fact, it's rela-
	24	tively rare on cross-examination that a defendant gets to

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explain things in the form and manner that he feels like

E. Tucker - cross mbrn51 explaining, and I think Mr. Tucker had that opportunity when he was on the stand Friday, and he has certainly taken the opportunity this morning. I think that your Honor has been more than 5 fair to Mr. Tucker in allowing him to make his defense 6 and explanation concerning this booklet. 7 THE WITNESS: I see the Page 22, "The Court: 9 Strike out the statement." I think I am reading the same thing, but "I 10 suggest that the jurors being reasonable men and women." 11 This comes prior to Page 21 where my answer was, 12 "Okay, now, Mr. Cutner, if we go through this book at 13 times we're going to have to flip back to other pages be-14 cause we must consider this book as a whole. If we take it out of context, it's possible that it could be misunder-16 17 stood." So all I ask, if the Court will just bear 18 along and -- then Mr. Cutner, "I move to strike out the 19 20 statement, vour Honor." 21 22 23

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E. Tucker - cross

me, it seemed like that and to the jury I feel that from gathering and from my own observation that they — it was as if the Court was chastising me for playing the jury's intelligence cheap by saying they could not read and understand the book; and I thought, and I have known from being in the mail order field, and obviously I have heard and have spoken with others in the field, that have had misrepresentation problems, and I know that one of the key things on misrepresentation in advertising is to make sure that the full story is read, that things are not taken out of context; and I think that is a very crucial thing in advertising, for things to be read in their context.

MR. CUTNER: I take it, your Honor, that Mr. Tucker has been unable to find any statement where your Honor denigrated his testimony in the presence of the jury.

THE WITNESS: When I showed the statement and the statement that I gave, and the inference that I gave it and the connotations that I gave to it, so you are wrong when you say Mr. Tucker." In fact, you found the statement first, and I think that statement there, and this is what I had said on the previous page, and that was the statement.

THE COURT: You don't feel the jurors are just as well equipped to read this book as anybody, and that you would have the opportunity to explain the book to them?

E. Tucker - cross

As far as I am concerned, that is what should be done.

sisted on and stressed the point of going back and forth to Page 10. And then for that comment, sort of backing that up, to me the inference that went over to the jury was that after I had said that about going back and forth to 10, the Court said: Well, the jury is reasonable men and so forth, the statement that is there together, and in the position that it's in, it's the feeling that I got at that moment and here we are dealing with an intangible, and the feeling that I got at that moment was saying, "Thank you, your Honor, we're intelligent enough to make our own — to come up with our own opinion and we don'thave to bounce around throughout the book."

MR. CUTNER: Your Honor, I think that perhaps your Honor should instruct Mr. Tucker that in the rules of court, things proceed such that during cross-examination, he is required to answer my questions, and when he is on his direct and redirect examination, he can make such explanations as are proper in response to the questions of his counsel, and I think that in this case, Mr. Tucker has been allowed a very unusual leeway in responding to questions on cross-examination.

	11.311
1	mbrpll5 E. Tucker - cross
2	can deal properly with this matter.
3	I will hear no more from you at any point
4	other than that you will answer questions which are asked
5	by the attorneys.
6	You may proceed.
7	BY MR. CUTNER:
8	O Mr. Tucker, Exhibit 51 is the second brochure
9	which you sent out; isn't that true?
10	A This is the flowers, yes, jewelry was the first,
11	flowers was the second, yes.
12	Q You sent out the booklet with the flowers in
13	the summ of 1974; isn't that true?
14	A Not the summer, Mr. Cutner.
15	THE COURT: No, it's not true, he says.
16	Next question.
17	He said it was not sent out in the summer of '74
18	That's the way I heard his answer. Let's get the next
19	question.
20	Q Was it in the early fall, Mr. Tucker?
21	A Mr. Cutner, may I present you with all my docu-
22	ments? I have them in the order they were sent out.
23	THE COURT: Was it the early fall?
24	THE WITNESS: I don't remember. I have my
25	documents.

1	mbrpl16 E. Tucker - cross 931
2	THE COURT: He doesn't recall.
3	Next question.
4	O Do you recall the testimony of the witnesses,
5	Mr. Pierce, Mr. Myers and Mr. MacGown, to the effect
6	that they received that booklet in October of 1974?
7	A No, I don't recall the testimony, but we have
8	all the shipments that we made over there and you have
9	them too.
10	THE COURT: Next question.
11	Q Would you concede, Mr. Tucker, that you m ailed
12	out that booklet prior to October of 1974?
13	A I will not concede when I have everyshipping
14	THE COURT: He will not concede it.
15	Next question.
16	Q Mr. Tucker, what would you like to refer to
17	which would refresh your memory?
18	A Refer to the only thing that we can refer to,
19	and that would be to Schedule, who mailed it and Blair,
20	who mailed it.
21	I had to go through the mail houses. I had
22	to go through the United States Post Office, and I will
23	show you postage receipts and cancelled postage checks.
24	Mr. Cutner, you have had all these records.

You just haven't studied them. They are right in your

- 1	31.3.3
1	mbrp118 E. Tucker - cross
2	MR. CUTNER: Move to strike, your Honor.
3	THE COURT: Strike it.
4	THE WITNESS: Mr. Cutner, you are being childish.
5	THE COURT: No, there is only one person around
6	here who is not being wise, and I am going to leave it to
7	your imagination to determine who is who.
8	Sir, try to answer the questions. I don't
9	know how many times I can tell you. Your function, once
10	you take the stand, is to answer questions. If the ques-
11	tions are improper, your counsel will object.
12	THE WITNESS: All right, your Honor.
13	Ω You did not give refunds on the mailing materials
14	A We did not promise or guarantee refunds on the
15	mailing material.
16	MR. CUTNER: Move to strike, your Honor.
17	THE COURT: Strike it. Try to answer the
18	question, sir. Did you or did you not give refunds on the
19	mailing material?
20	THE WITNESS: Your Honor
21	THE COURT: Yes or no?
22	THE WITNESS: Could I answer with an explanation?

We have heard it three times.

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THE COURT: No. I know what your explanation is.

Mr. Cutner is entitled to an answer to his

1	mbrp123 E. Tucker - cross
2	O Did you make the statement, "There is money
3	to be made"?
4	A I made that statement in the context.
5	O Would you wait for my question, Mr. Tucker?
6	A Yes, sir.
7	Q Did you make the statement, "There is money to
8	be made for sure"?
9	A I made that statement in the same paragraphs.
10	MR. CUTNER: Move to strike out everything after
11	"I made the statement."
12	THE WITNESS: "Without risking any substantial
13	amount of capit," in the same paragraph.
14	THE COURT: Did you make the statement, sir,
15	that he read?
16	THE WITNESS: I made the statement in that
17	same paragraph.
18	THE COURT: Yes, he made the statement. He
19	says that he added more material to it, and he's read
20	that material, and the jury will consider all of the mater-
21	ial to determine whether the statements are true or not
22	true or misleading.
23	THE WITNESS: Your Honor, may I say this?
24	THE COURT: No.
25	Next question, Mr. Cutner.

wife just took --

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Honor.

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Q Listen to my question, Mr. Tucker.

Isn't it true that your wife signed an affidavit and not Mr. Gensler?

A The way you are stating it now, unless I understand the question wrong, we have an affidavit that Mr. Gensler signed.

THE COURT: Do you say that Mr. Gensler signed this statement in front of a Notary Public?

THE WITNESS: We don't state on there that he signed it in front of a Notary Public.

We state that my wife went to a Notary Public and stated: I saw Mr. Gensler sign the above statement, and it states that specifically, and I again ask my attorneys to let the jury see that, because in talking about it, it's misleading, but again, my attorneys saw reason not to pass the papers around, as Mr. Cutner had done. And to me, I think I understand that it drew the wrong impression.

THE COURT: I want to hear that answer again. I want to hear it read, and I want the jury to have this accountant's statement in front of them when they hear it.

MR. CUTNER: I will be very happy to, your

THE COURT: Indicate what exhibit you are passing

343
mbrp130 E. Tucker - cross
THE COURT: 51 in Evidence is in front of all
the jurors.
MR. CUTNER: Page 2.
THE COURT: Page 2.
MR. CUTNER: We're referring to the legal sworn
affidavit.
THE COURT: Everyone see that? Very well, I wan
to have the question read and I want the answer read.
(Question by the Court and answer read.)
Q All right, Mr. Tucker, where on Exhibit 51 does
it say that your wife Gail Tucker signed the affidavit?
A Again, if you are so confident of this state-
ment that we have done something wrong here, Mr. Cutner,
let the jury see the original statement of Mr. Gensler.
Would you please?
THE COURT: Did you send the original statement
of Mr.Gensler to any person who sent in money?
THE WITNESS: Yes, if they asked for it, yes, we
did.
THE COURT: Name one. Name one person to whom
you sent that Gensler statement that's signed by your wife?
THE WITNESS: When Chelsea Bank or any of the
banks would ask us, when customers would write us and say

send the anme of the accountant, would you send us the

E. Tucker - cross 1 mbrp134 THE COURT: You just name one investor, one of the people who sent in money to your firm to whom you 3 sent this original document which was signed by your wife. Just name one. 5 THE WITNESS: Your Honor, that's an unfair ques-6 7 tion. 8 THE COURT: Can you name one? 9 THE WITNESS: It's an unfair -- I had 10,000 10 agents. That's an unfair question. THE COURT: Then you only have to name one of 11 12 them to us. THE WITNESS: That's still an unfair question. 13 14 I don't know any of my agents. THE COURT: If it's unfair, I will withdraw it. 15 THE WITNESS: I will go through the files. 16 17 THE COURT: I will ask the jury to disregard it. He says it's unfair. I will withdraw it. Jury, disregard 18 19 it. THE WITNESS: Mr. Cutner, you are succeeding in 20 what you are doing, making it seem like I am being contrary, 21 and you know it's not fair. Why are you holding back 22

Please try to answer my question, Mr. Tucker.

When one of your customers asked for the name

original documents from the jury?

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BY MR. CHANCE: 2

> O Mr. Tucker, will you take your time for a moment and explain to this jury and the Judge exactly what the mail order business is and its nature, how it is done and how it's accomplished including drop shipments.

> > Yes, sir. A

THE COURT: No. I don't want to know about the mail order business. I want to know how he conducted his business.

MR. CHANCE: His method I meant, Judge.

THE COURT: All right, let's be specific.

Well, I hope that my method is representative. A

THE COURT: J ust describe it. What you did,

your method. Go ahdad.

Yes.

I hope that my method --

THE COURT: You can't stop, can you? I don't want to know what you hope. I want to know just as your attorney does, what your method is. What was

it? Describe it. That's all.

THE WITNESS: All right.

My method in my opinion is representative of the methods and the systems that are being also offered to opportunity seekers and speculative investors throughout

A Would you repeat it again, please.

THE WITNESS: Your Honor, your man feels a little intimidated.

THE COURT: You are not intimated.

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A Yes, sir.

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O Do you recall what that condition was?

A Yes, sir.

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O Right, page 2 of the brochure.

As to this what they call legal sworn affidavit on page 2 of the brochure, you are saying that Mr. Gensler signed a statement that you did make \$35,000 a year, is that correct?

A Yes, sir.

O And then subsequent to the signing of that statement, your wife went to a notary?

THE COURT: He never said that he made it. It's either grossed or earned. Let's be precise, counsel. You know that. And you are a lawyer. I put it up to you to ask a guestion oronerly. Here it says earned. Gensler said grossed. Now, ask a proper question.

MR. CHANCE: Did I do something that bad? What I was doing I was reading from the pamphlet.

THE COURT: He never said he made. It said earned and Gensler used the word gross. You can take either one.

MR. CHANCE: Judge, that was his testimony but I was reading from the brochure and it does not say earned or grossed.

THE COURT: You didn't say either. You said made. You want to hear your question? Sustained as to form.

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taken advantage of it.

me in jail for the rest of my life. Well, I am intimidated and I don't know whether I have a lawyer. I am intimidated. I don't know what to do now. I am absolutely intimidated. I don't know what to say. I don't know whether I have had a lawyer who is representing me.

THE COURT: I tell you what to say, the truth.

And I say one more thing to you. Listen to the questions

which are asked and answer them.

THE WITNESS: I resnet my lawyers are coming here asking me to -- telling me that your Honor has given them an opportunity -- given me an opportunity if I want to plead guilty and this and that. I am not guilty.

I am not going to plead guilty and if you want to give me 18 years, your Honor, I will take the 18 years.

THE COURT: I wouldn't take a plea of quilty from you --

THE WITNESS: I never offered it.

THE COURT: -- if it was your last breath.

THE WITNESS: It was offered to me and I am not quilty and I don't think it is fair.

THE COURT: I am going to state again. I would not accept a plea of guilty from you if it was your last

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J. Ward

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CHARGE OF THE COURT

THE COURT: Ladies and ge men of the jury:

It is the custom in this court that the jurors seated in Seat No. 1, in this case Veronica M. McBride, will act as the foreperson of the jury.

The function of the foreverson is to tally the vote of the jurors. If during the course of your deliberations any requests are made to the Court, it is the function of the foreperson to see to it that these requests are written out on paper. Paper will be supplied to you together with pencils, and the request will then be sent out to me.

After I receive a request from the jury, I will review it with counsel, and attempt, wherever possible, to respond to your request as promptly as I can.

Members of the jury: You are about to enter upon your final duty, which is to decide the fact issues in the case.

While numerous exhibits have been received in evidence, actually the fact issues that you are going to be called upon to decide, fall within a fairly narrow compass. You are to perform your final duty in a complete attitude of fairness and impartiality. You are to appraise the evidence calmly and deliberately, and as was

emphasized by me at the time you were first selected as jurors, without the slightest bias or prejudice for or against the government or the defendants, as parties to this litigation.

Let me add the fact that the government is a party entitles it to no greater consideration than that accorded to any other party to the litigation.

By the same token, it is entitled to no less consideration.

All parties, government and individuals, stand as equals at the bar of justice.

You are the sole and exclusive judges of the fact.

You pass upon the weight of the evidence, and you and you alone determine the credibility of witnesses. You resolve whatever differences there may be in the testimony and you draw whatever reasonable inferences you may find warranted by the facts as you determine them.

My function, at this point, is to instruct you as to the law. It is your duty to accept these instructions of law and to apply them to the facts as you find them.

The logical result of that application is the verdict in this case.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that

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counsel, either for the government or for the defendants, may have said with respect to matters in evidence, or as to any factual matter, whether stated in a question, in colloquy with the Court, in argument, or in summation, is not to be substituted for your own recollection of the evidence.

So, too, anything that the Court may have said during the trial or may refer to during the course of these instructions as to any factual matters in evidence is not to be taken in substitution of your own recollection as to any factual matter.

The case must be decided, and this I told you at the time of your selection as jurors, upon the sworn testimony of the witnesses, any stipulations entered into among counsel and such exhibits as were received in evidence.

During the course of the trial, you have observed that from time to time counsel made objections to the asking of certain questions, to the admission of certain items offered in evidence, motions to strike out or limit testimony were made.

It is in this manner, through such objections and motions, that questions of law are raised in our trial procedure, and they affect you, the jury, not one bit.

You remember I told you that the law of the case is the prerogative of the Judge, and not of the jury,

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and so to each of these objections, I made a ruling, which was a decision on the law.

You must not concern yourselves in the slightest with what I said or what you think I meant by any of these rulings, because these are matters of law for which I take all responsibility as the trial Judge.

Neither the objections or motions made by counsel on either side, nor the rulings made by me are to enter into your deliberations. You are not to permit yourselves to be influenced at all either by the language or manner of counsel in stating these objections or motions, or by the words or the ways of the Court in ruling on them.

As I told you earlier, you will be able, should you request them, to have the exhibit sent in to you in the jury room, and should you have any questions and doubts as to what was said by a particular witness when he or she testified, you may send out a note and request that the testimony of that witness be read back to you in whole or in part.

In that event, I will convene Court, you will come out, and listen as the court reporter reads from his notes whatever testimony you specifically request.

Before we consider the precise charges contained in the indictment, some preliminary observations are

in order.

We started this trial with 32 counts, or separate charges. I have withdrawn from your consideration fourteen counts of the indictment. You are not to concern yourselves with the reasons for the withdrawal. That was done as a matter of law, and in no respect is the fact of the withdrawal to enter into your deliberations.

You are to be concerned only with the 18 counts that remain, and you will consider only the evidence which relates to those 18 counts.

Also, there are certain principles of law which apply in every criminal case, and which likewise I have made reference to and emphasized at the time of your selection as jurors.

Although you were selected as jurors only last week, I will take this occasion to repeat them again.

The indictment upon which the defendants are brought to trial is merely an accusation, a charge. It is no proof or evidence of the **defendants'** guilt. No weight is to be given to the fact that a Grand Jury returned the indictment agai at the defendants.

Both defendants have pleaded not guilty, and thus the government has the burden of proving the charges against them beyond a reasonable doubt. It is a burden that

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never shifts and remains upon the government throughout the entire trial.

innocence. On the contrary, they are presumed to be innocent of the charges contained in the indictment. This presumption of innocence was in their favor at the start of the trial, continued throughout the trial, and is in their favor as I instruct you at this point and even continues in their favor during the course of your deliberations in the jury room. It is removed only if and when you, the members of the jury, are satisfied that the government has sustained its burden of proving the charges, beyond a reasonable doubt.

Mow, what is a reasonable doubt? A reasonable doubt is such a doubt as would cause you to hesitate to act in a matter of importancein your own lives. It is a doubt which a reasonable person has after carefully weighing all the evidence.

Reasonable doubt is one which appeals to your reason, your judgment, your common sense, and your experience.

Reasonable doubt is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

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Vaque, speculative or imaginary qualms or misgivings are not reasonable doubts.

It is not necessary for the government to prove the guilt of a defendant to a mathematical certainty or beyond all possible doubt. If that were the rule, few men or women, however guilty they might be, would be convicted. The reason is that in this world of ours it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty.

In consequence, the law is such that in a criminal case it is enough if proof that a defendant is quilty is established beyond a reasonable doubt, not beyond all possible doubt.

If, after a fair, impartial and careful consideration of all the evidence, you are convinced of the guilt of a defendant, you must convict that defendant.

If, on the other hand, after such a fair, impartial and careful consideration of all the evidence you doubt a defendant's quilt, you must acquit that defendant.

I turn now to the indictment in this case. I shall not read the indictment but merely indicate two things:

First, the indictment describes the scheme to defraud charged, and then sets forth specific mailings

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as numbered counts. The scheme charged applies to each count. Then each mailing alleged constitutes a charge of a separate offense, and each of 18 mailings which constitute 18 counts or charges must be considered separately.

I have determined that rather than read the indictment to you, I will send a copy of the indictment with you when you retire to deliberate on this case.

In addition, counsel have agreed and I shall furnish you at the time you retire to deliberate on this case with 12 copies of the brochure or booklet.

You recall counsel indicated that they believed that your reviewing the brochure would be helpful.

Therefore, when you retire to deliberate, I will furnish your forelady with a copy of the indictment containing the 18 counts which are to be considered by you, and in addition, each of you will have a brochure so that each can look through it as he and she sees fit.

The indictment names two defendants: Ernest Lee
Tucker and Gail Ann Tucker. In the determination of
innocence or guilt, you must bear in mind that guilt is
personal. The guilt or innocence of a defendant on trial
before you must be determined separately with respect to
him or her solely on the evidence presented or the lack
of evidence.

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The case against each defendant stands or falls upon the proof or lack of proof of the charge against him or her, and not against somebody else.

There are two criminal statutes involved in this case. Section 1341 of Title 18, United States Code, provides in the pertinent part as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises..for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom any such matter or thing or knowingly causes to be delivered by mail according to the direction thereon any such matter or thing" -- and I interpolate now -- commits a crime.

You will note when you examine the indictment that in addition to charging violation of Section 1341 of Title 18, United States Code, the indictment also charges violation of Section 2 of Title 18, United States Code.

That section provides that a person who:

"Aids, abets, counsels, commands, induces or procures" the commission of "an offense against the

United States," is as equally punishable as a person who directly commits the offense.

I shall turn first to the essential elements of mail fraud and later I shall speak briefly about aiding and abetting.

In order to find a defendant guilty under any count in this indictment, the government must establish beyond a reasonable doubt the following essential elements;

(1) That a scheme or artifice to defraud or to obtain money by false and fraudulent pretenses, representations, or promises, as alleged in the indictment, was devised by the defendants, or either of them.

as I have indicated you will consider each defendant separately, knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with the intent to defraud, or that the defendant you are considering knowingly and intentionally aided and abetted the other defendant to do so.

I turn to the first of the three elements of mail fraud, the existence of a scheme to defraud.

the use of the mails in furtherance of that scheme.

The first element of the offense is the existence

And (3) that as to each count, there occurred

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of a scheme or artifice to defraud or to obtain money or property. means of false or fraudulent pretenses, representations, or promises.

The first element is almost self-explanatory.

It embraces any scheme, artifice, trick, device or deceit intended to deprive a person of his money or property, whether by false representations, by suppression of truth, or by half truths, designed to deceive.

A statement, representation, claim or document is false if untrue when made, and was then known to be untrue by the person making it or causing it to be made.

A statement, representation, claim or document is fraudulent if it was falsely made or caused to be made with intent to deceive.

The fraud contemplated by the statute is not limited to active misrepresentation. Indeed, a fraudulent scheme may exist although no express misrepresentation of fact is made. The deceitful concealment of material facts or deceitful half truths may also constitute fraud, and the devising of a scheme for obtaining money by such half truths or concealments is in violation of the statute. The deception need not be premised upon verbalized words alone. The arrangement of the words, or the circumstances in which they are used, may convey a false and

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deceptive appearance. In other words, once having undertaken to state a fact or facts, there is an obligation on the one who does so, not to give such a distorted picture of them as to make the statement misleading concerning what the actual facts really are.

Sometimes a half truth is no better than an outright falsehood, and a fraudulent misrepresentation may be affected by half truths, calculated to mislead. Having chosen to speak, there is an obligation to state all the facts which are necessary to a proper understanding of the particular subject matter which is being covered.

A statement, although literally true, is none-theless false if we interpret it in light of the effect it would produce on the minds of those whom it was calculated to influence, it would create a false impression of the true state of affairs. In other words, if there is deception, the manner in which it is accomplished is immaterial.

The indictment lists as you will see a number of misrepresentations allegedly made by the defendants as part of the scheme to defraud. It is not necessary, however, that the government prove every misrepresentation alleged in the indictment. It is sufficient if the prosecution proves beyond a reasonable doubt that a scheme

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involving at least one of the kinds of deceptions allegedly existed, and amounted to a scheme to defraud or to obtain money or property by false representations, pretenses, or promises.

The government has the burden of proving the essential elements of the scheme to defraud, but it is not necessary to prove that every step of the scheme was accomplished. The crime is complete when the scheme is conceived and the mails are used in furtherance of it.

Because the crime is the scheme and not the result of the scheme, I instruct you that in order to convict, it is not necessary for you to find that a defendant realized any gain whatsoever from the scheme, nor is it necessary that the intended victims suffered any loss whatsoever.

The question is did the defendant you are considering knowingly devise a scheme to defraud and to obtain money and property, and did he or she use the mails to further the scheme.

Furthermore, you must inquire whether the defendant you are considering aided and abetted another in carrying out the scheme.

It is not necessary for the government to establish that anyone relied on, or suffered damage as a consequence of, any false statement or omissions of material

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facts, although the government does contend in this case that the persons who invested money did rely on these statements and omissions of material facts and did sustain financial losses. It is enough that false statements or statements omitting material facts were made in the expectation that they would be relied upon.

I turn now to the second element of mail fraud. The second element under each count that the government must prove beyond a reasonable doubt in order to convict either defendant is that he or she knowingly and willfully participated in the scheme or artifice to defraud and with intent to defraud.

An act is done knowingly if it is done voluntarily and purposely and not because of mistake, accident, mere negligence, or other innocent reason.

An act is done willfully if it is done knowingly and deliberately.

Under these statutes, a false representation or omission to state a material fact does not amount to a fraud unless it is made with fraudulent intent.

However misleading or deceptive a plan may be, the use of the mails to execute it does not constitute a crime if the plan was devised in good faith. An honest belief in the truth of the representations made by a person

is a good defense, however inaccurate the statements may turn out to be.

The mere fact that a statement may be inaccurate or even a gross misrepresentation of the facts does not amount to freud in the law unless the statement was made by the defendant knowingly and willfully and with an intention to deceive.

The question of the defendant's knowledge, intent and wilfulness is a question of fact which you must decide in this case. But unlike other questions of fact, it involves what is in a person's mind or the purpose which motivates him or her in a given course of conduct.

Obviously we have not yet devised an instrument to record what goes on in a man's mind. Rarely is direct proof available that a man has knowledge of a particular fact or has a particular purpose in mind when he acts. On occasion he may write a letter or admit having knowledge that a statement was false or orally acknowledge that he had an evil purpose, but this is rare, and plainly the exception rather than the rule.

Thus, direct proof of the knowledge of falsity and of wilful and wrongful intent is not necessary.

Usually such knowledge or purpose is established by circumstantial evidence and determined from the acts and conduct

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and all the circumstances and the natural inferences that you may draw therefrom. I will come back to this matter of direct and circumstantial evidence and attempt to define both for you in just a few minutes.

Turning to the third element of mail fraud, I have already told you that the third element of the offense charged in Counts One through Eighteen is the use of the mails.

In order to constitute a violation, the use of the mails must be in furtherance of the scheme to defraud. Each of the mail fraud counts which are being submitted to you charges a separate use of the mails.

The gist of this crime is the use of the mails and each separate use of the mails in furtherance of the scheme constitutes a separate and distinct offense.

that a defendant actually placed any of the items listed in the indictment in the mail. It is sufficient for the government to prove that the defendant you are considering caused the mailing to be made in the ordinary course of business, which mailing was made in furtherance of the scheme. If the defendant took steps which he or she knew or could reasonably have foreseen at the time would naturally and probably result in the use of the mails, then that

defendant has caused the mails to be used, and it is sufficient if the items charged in the indictment were mailed by an agent of the defendant or by someone or some persons who relied upon the defendant's representations in furtherance of the scheme to defraud.

Nor is it necessary that the government prove as to a defendant that he or she knew of or participated in the mailing of the various letters set forth in Counts One through Eighteen of the indictment. It is sufficient if you find that the defendant you are considering participated in the scheme to defraud in some measure as I have already instructed you and could reasonably have foreseen that the mails would be used. Under such circumstances the mailing is chargeable to him or her whether or not he or she specifically knew of it.

The 18 counts of the indictment charge that certain acts and certain mailings occurred on or about certain dates. It does not matter if the transaction or mailing occurred on the exact date listed in the indictment. The law only requires a substantial similarity between the dates charged in the indictment and the dates proved.

The mailings also list specific addressees at specific addresses. You must find that the mailing to the individual addressee occurred.

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However, I instruct you that you need not find that the item listed in the indictment was mailed to the exact address specified in the indictment. What you must find is that it was mailed.

I turn now to aiding and abetting, a subject which I said I would return to later in my charge. It is not necessary for the government to show that a defendant physically committed the crime himself or herself. You will recall that Section 2 of Title 18, United States Code, which I read to you, provides that a person who aids. and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find either defendant guilty of the offenses charged if you find that beyond a reasonable doubt that one defendant committed the offense and that the other defendant aided and abetted that defendant.

To determine whether a defendant aided and abetted the commission of an offense, you ask yourself these questions: Did he or she associate himself or herself with the venture? Did he or she participate in it as something he or she wished to bring about? Did he or she seek by his or her action to make it succeed?

If the defendant you are considering did this, then that defendant is an aider and abettor.

A few words about the nature of the evidence. The law recognizes two types, direct and circumstantial, upon which jurors may rely to find an accused guilty of a crime.

Direct evidence is where a witness testifies to what he saw or heard, what he knows of his own knowledge, something which comes to him by virtue of his senses.

Circumstantial evidence is reasoning from a fact which is proved to the ultimate fact that is sought to be established.

In simple terms, you reason from an established fact to another fact. The established fact or circumstance must have a rational tendency to show and from which you may rationally and logically infer the ultimate fact to be established.

Circumstantial evidence, if believed, is of no less value than direct evidence, for in any case you must be convinced beyond a reasonable doubt of the guilt of the defendant.

I have sometimes suggested to jurors the following example which may give you a better idea of what is
meant by circumstantial evidence.

Assume that when we entered the courtroom this morning, there was bright sunlight. It was a clear dry day.

Assume further that you are sitting in your jury box, that the blinds across the way from you are closed, that there are drapes over the blind, and you cannot see out, so that you cannot observe the atmosphere and the weather condition.

Assume that after we have been sitting here a while, you observed a man walking into the courtroom with an umbrella that was dripping wet. Then he was followed by another person wearing a raincoat which was wet. Then perhaps as we were seated here you heard the beat of something against the window.

Realistically, if I asked you as a fact, can you see if it is raining outside, you wouldhave to say no. You knew as a fact that it was dry with the sun shining when you came in. Yet, if I asked you if it was raining outside, even though you couldn't see outside, you would be justified on the basis of common experience with those two people walking in, and the beating against windows, in saying that it was raining even though you could not directly see it.

You reason from facts to the ultimate fact.

That is all that circumstantial evidence is all about.

If the reasonable inferences to be drawn from any evidence, direct or circumstantial, lead to two conclusions, one favoring innocence and the other favoring

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guilt, then it is your duty to accept that which favors innocence. That would be so since each inference is logical and reasonable. Then the defendants are entitled to the benefit of the doubt.

Guilty knowledge and especially attempted fraud rarely can be shown by direct evidence, as I have indicated previously. Usually, they are established by circumstantial evidence.

Knowledge and intent when in the mind of another is subjective. What is in that person's mind? You must look to the evidence, ladies and gentlemen, direct and circumstantial, to determine what knowledge one had or with what intent one had committed a charged act.

Conduct of a defendant, including documents prepared by him or by her may be considered in the light of other evidence in the case in determining an accused's guilt or innocence.

A document or statement when shown to be fraudulent may be considered as circumstantial evidence of consciousness of guilt.

I now turn to your primary function, which is to determine where the truth lies. How do you determine where the truth lies?

I mentioned at the start of the trial that it

was important for you not only to listen but to look at and observe each witness as he or she testified. Your determination of the credibility of a witness very largely depends upon the impression that he or she made upon you, as to whether he or she was giving an accurate version of what occurred.

I sometimes say to jurors, when you walk into this courtroom and sit in the jury box while the trial is going on, or while you are deliberating in the jury room, you have with you your common sense, your good judgment and your life experience.

witness should be determined by his demeanor, or her demeanor, his or her relationship to the controversy and to the parties, his or her bias and impartiality, the reasonableness of the witness' statements, the strength or weakness of the witness recollection, viewed in the light of all other testimony and the attendant circumstances.

At times a witness may testify that an event occurred or that he observed something. You will note from experience that the manner of speaking is such that we can draw the conclusion that the truth is the exact opposite of what he said, but what you do is you evaluate the testimony of the person giving evidence, you evaluate

his demeanor, you size up that person pretty much as you do when you are trying to decide whether someone is giving you an accurate version of an occurrence. You accept, you reject, as you would when you are on the outside in your everyday dealings.

The ultimate question with respect to each witness always is: Did that witness tell the truth when he appeared before you? That is the ultimate question.

The law permits but does not require a defendant to testify in his or her own behalf. Both defendants testified. You must determine how credible their testimony is. Obviously, each has a deep interest in the result of the case. It is fair to say that a defendant has the greatest stake in the outcome of a case in which he is the defendant. Interest creates a motive for false testimony. The greater the interest, the stronger the motive, and a defendant's interest in the result of a trial is of a character possessed by no other witness.

In appraising a defendant's credibility, you may take that fact into consideration. Yet it does not follow simply because a defendant has this great interest in the result of the case that he or she is not capable of telling a truthful story. It is for you to decide to what extent, if at all, a defendant's interest has affected or colored

his or her testimony. It is simply a factor that you may take into account in passing on his or her credibility.

If you find that any witness -- and this applies to all witnesses -- wilfully testified falsely as to any material matter, you have a right to reject the testimony of that witness in totality, or to accept that part or portion which commends itself to your belief or which you may find corroborated by independent testimony in the case.

The relationship of husband and wife is a very singular and personal one, and by its nature requires or compels close association. The jury is not to infer quilt merely because the defendants are married. You must go beyond that in determining where the truth lies in this and in any case.

The charts and summaries of evidence which you heard about, which are in evidence before you, are not evidence themselves. They are mere resumes, visual representations of information or data, as set forth in the testimony of witnesses or in documents that have been received in evidence. They are no better than the testimony or the documents upon which they are based. It is for you to decide whether the charts, schedules, or summaries correctly present the data set forth in the testimony and in the exhibits on which they are based.

As I said before, you are to consider each count separately, and there are 18 against each defendant. You are to consider each count as if it was the sole charge against the particular defendant.

The government, to prevail, must prove the essential elements of each alleged crime by the required degree of proof as already explained in these instructions. If the government succeeds in proving the essential elements beyond a reasonable doubt, your verdict should be guilty. If it fails, your verdict should be not guilty.

Thus, you may find each defendant either guilty on all 18 counts or you may find each not guilty on all 18 counts, or you may find each guilty on some counts and not guilty on the others.

The verdict on each count on **each** defendant must be unanimous. Your function is to weigh the evidence in the case, and to determine the guilt or innocence of the defendants solely on the basis of the evidence and my instructions on the law.

As I said earlier in the trial, under your oath as jurors, you cannot allow a consideration of the punishment which may be inflicted upon a defendant if convicted to influence your verdict in any way, or in any sense enter

into your deliberations. The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of each defendant solely on the basis of such evidence and the law.

The fact that the defendants are of different races is not to be a part of your consideration.

You are to decide the case upon the evidence and the evidence alone. You must not be influenced by any assumption, conjecture or sympathy, or any inference not warranted by the facts until proven to your satisfaction.

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of not guilty. But, on the other hand, if you find that the law has been violated as charged, you should not hesitate because of sy pathy or any other reason to render a verdict of guilty.

Each of you is entitled to his or her own opinion. What you are required to do is to go into the jury room, exchange views with one another, consider the evidence, listen to the arguments of your fellow jurors, present your own views, consult with one another, andreach an agreement solely and only on the evidence and in

accordance with the instructions of law which I have given.

If you should have a point of view which differs from that of a fellow juror or jurors, you should listen to argument based on the evidence with an open mind, and if you are persuaded that your point of view should yield on the evidence, there is no reason why you should not change your mind.

However, ladies and gentlemen, your final vote must reflect your own conscientious judgment as to how the case should be decided.

I have finished my charge. I will at this time see counsel at the side bar. I will ask first if Jurors 1 through 12 are all feeling well and fit, both mentally and physically, and able to deliberate on this case.

Do any of the jurors who sit in Seats 1 through 12 feel ill, or poorly physically or feel that they are not in a frame of mind which permits them to deliberate fully and fairly on this important case?

If so, please raise your hand.

I note no hand raised. I will ask our two alternate jurors to proceed to the jury room to reclaim their belongings. Then I will ask you while I am meeting with the lawyers at the side bar to return to the jury box, because when the other jurors are sent in to deliberate,

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I wish to excuse you with the thanks of the Court.

I will see counsel at the side bar.

(At the side bar.)

THE COURT: Are there any exceptions to the Charge, Mr. Cutner?

MR. CUTNER: Your Honor, I was not aware that your Honor gave the two inferences charge concerning circumstantial evidence, and with all respect, your Honor, I do object to that.

I think it's been ruled incorrect by the Court of Appeals and I would note my objection.

THE COURT: Your objection is noted.

Do you have any exceptions, Mr. Chance?

MR. CHANCE: Yes, I have an exception. I have an exception to the statement that you made that the government must prove each essential element of the crime.

I think they should prove every element of the crime.

THE COURT: I said each and every element of the crime.

MR. CHANCE: I thought you said essential element of the crime.

THE COURT: No. Let me suggest that I will check.
Off the record for a minute.

(Record read.)

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THE COURT: What I will do is I will give a brief supplementary instruction, the essence of which will be that it is the burden of the government to prove each and every element of the crime charged beyond a reasonable doubt.

MR. CHANCE: Thank you.

THE COURT: Are there any other exceptions,

Mr. Chance?

MR. CHANCE: That's the only one I have.

THE COURT: Mr. Richardson.

MR. RICHARDSON: Yes. With respect to aiding and abetting, I think your Honor did not charge that there had to be an intent to aid or abet, that it was done knowledgeably, the aiding and abetting is willful.

I think your Honor said that mere aiding and abetting was sufficient.

THE COURT: Read that back.

(Record read.)

THE COURT: I have reviewed my charge on aiding and abetting and will not change it.

Do you have any other exceptions?

MR. RICHARDSON: No, sir.

THE COURT: Are there any requests for supplementary instructions, Mr. Cutner?

CERTIFICATE OF SERVICE

JOSEPH BEELER, one of the attorneys for Appellants, certifies that all parties required to be served have been served and specifically that he mailed two copies each of the foregoing Brief for Appellant and Appendix for Appellant to the United States Attorney for the Southern District of New York, on this 13th day of June, 1977.

Joseph Beelen